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Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-898

NORVAL GOSS, *et al.*,

Appellants,

—v.—

EILEEN LOPEZ, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

BRIEF OF THE NATIONAL COMMITTEE FOR CITIZENS IN EDUCATION; THE NATIONAL EDUCATION ASSOCIATION; AND THE EDUCATION LAW CENTER, INC., AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

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CONSENT TO FILING

This Amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of all parties to the case.

INTEREST OF *AMICI CURIAE*

National Committee for Citizens in Education. NCCE is a national public interest group in education with a broad based citizen membership. Its predecessor organization, the National Committee for Support of the Public Schools, was founded in 1962 by a group of distinguished Americans, including Harry S. Truman, Agnes B. Meyer, James B. Conant and Omar V. Bradley, to focus public attention on the financial needs of the schools. NCCE was reconstituted and renamed in 1973 to reflect its transformation to a mass membership organization committed to building an effective citizen voice in education.

NCCE seeks to rekindle the public interest in education, to increase citizen participation in education decisions, to redress the balance of control. NCCE is committed to public education as an essential institution of our democracy and serves as a mechanism for an informed public to speak out and act on the major education issues before the nation. Because it believes that basic rules for just consideration of educational controversies must be established, the National Committee supports the right of children who are to be suspended to have a hearing.

National Education Association. The NEA, founded in 1857 and chartered by a special act of Congress in 1906, is the nation's oldest and largest organization of educators. It currently has more than 1,400,000 members. The NEA's purposes, as set forth in its charter, are to "elevate the character and advance the interests in the profession of teaching and to promote the cause of education in the United States." To this end, the NEA is dedicated to the

protection of the constitutional rights of both teachers and students.

The specific question presented in this case is whether a public school may constitutionally suspend a student without notice, hearing, or any other procedural protection. NEA's code of student rights and responsibilities, produced in 1971 by a special task force selected for that purpose, provides detailed procedural rights for any student threatened with an expulsion or suspension for longer than one day. The decision of this Court will have a significant impact on the extent to which such procedural rights will be made available in public schools in the years ahead.

Education Law Center, Inc. The Education Law Center is a public interest law center, incorporated in 1973 as a New Jersey Not-for-Profit Corporation. The Center is primarily active in the States of New Jersey and Pennsylvania in helping parents and students to realize the promises of equal educational opportunity and quality education for all. To this end, the Center engages in litigation of cases with broad educational policy implications, and provides technical assistance to parent and student organizations, as well as other agencies.

As the only public interest law center dedicated exclusively to the education law field, the Education Law Center is vitally interested in the continuing role of the federal courts in this area. The Center is involved in many cases presenting both substantive and procedural aspects of school discipline, which, like this one, require that a balance be struck between the duty of the State to operate the schools and the constitutional rights of individual children.

STATUTE INVOLVED

Section 3313.66 of the Ohio Revised Code provides, in relevant part, that:

> "The superintendent of schools of a city or exempt village, the executive head of a local school district, or the principal of a public school may suspend a pupil from school for not more than ten days. . . . Such superintendant, executive head, or principal shall within twenty-four hours after the time of . . . suspension, notify the parent or guardian of the child, and the clerk of the board of education in writing of such . . . suspension including the reasons therefor . . . ."

Section 1010.04 of Columbus Public Schools Administrative Guide provides that:

> "Pupils may be suspended . . . from school in accordance with the provisions of Section 3313.66 of the Revised Code."

QUESTION PRESENTED

Does the due process clause of the Fourteenth Amendment to the United States Constitution prohibit a public school system from suspending students from school for one or more periods of up to ten days without any type of notice or hearing (a) prior to such suspension, where the student's alleged conduct does not present a threat of disrupting school affairs; or (b) promptly after the suspension is imposed, where it is believed that the student's alleged conduct does threaten such a disruption?

STATEMENT OF FACTS

The full factual background of the case and the opinion of the court below appear elsewhere. Nevertheless, in view of the contentions of the Appellants and the Amici supporting them, we believe it important to set out certain of the facts in some detail.

In February, 1971, a number of public schools in the City of Columbus, Ohio, were affected by racial disturbances. The precise cause of such disturbances does not appear from the record, but they seem to have stemmed from disputes involving Black History Week in a number of high schools. (A. 127). As a result, and purporting to act under Section 3313.66 of the Ohio Revised Code quoted above, the principals and assistant principals of Central and Marion-Franklin High Schools and McGuffey Junior High School summarily suspended a large number of black students—at least 75 at Central High School alone. (A. 120). All of the students received zeros for the work missed during their suspensions (A. 164-65); several of them were given punitive transfers as a result of their suspensions (A. 130, 151); and some of the students had permanent notations of their suspensions made in their school records (A. 219, 244, 256). None of the students were given the benefits of even the most rudimentary procedural protections. Some of them were never even told why they were suspended.

The suspensions of the four plaintiffs who testified at the trial appear to be typical:

Dwight Lopez. In February, 1971, Dwight Lopez was a student at Central High School. On the morning of February 26, 1971, he had a free study period in the lunch-

room. While he was there, some black students came in and started overturning tables. Lopez testified that he and several of his friends thereupon walked out of the lunchroom; that he took no part in the disruptive activities; and that he did not violate any school rule. (A. 128).

In view of the disruptions at the school, the school day was ended early and all students dismissed during the morning. Later in the day, while Lopez was at home, his parents received a phone call from the principal of Central High School notifying them that Lopez had been suspended. No reasons were given. (A. 128-29). In addition, a letter dated the same day was sent to Dwight's parents by the principal. It stated, *inter alia*, that there had been a "continued problem in school for several days and today a group of students disrupted our complete school program. Dwight was in the group . . . ." (A. 190). Lopez and his parents were instructed to appear at the Board of Education on March 8 for the limited purpose of discussing "Dwight's future educational plans." (A. 193). When they did so, however, they were unable to get into the building because several hundred persons conducting a protest of Board policies were blocking the entrances. (A. 124). Lopez and his parents attempted to reschedule the meeting, but the school officials were always unavailable. (A. 122). Lopez was never allowed to return to Central High and on March 24, 1971, he was transferred from Central to the Adult Day School. (A. 193-94).

It seems, but is not entirely clear from the record, that Lopez was suspended from school because he was thought to have participated in the disruption in the school cafeteria. As a result of his suspension, which in fact lasted nearly one month, he was transferred from Central High School to the Adult School. Despite the fact that Lopez

denied that he participated in any disruptive activity, he was never given any opportunity, either before or after the suspension, for a hearing on the merits of his suspension. Furthermore, there was obviously no emergency requiring Lopez to be removed from the school grounds since school had been let out for the day and he was at home when he was notified of his suspension.

Betty Crome. In March, 1971, Crome was a student at McGuffey Junior High School. On March 3, 1971, there were disturbances at school, and a number of students were blocking the halls and making it impossible for the students who wished to reach their assigned classes to do so. Crome testified that in order to avoid the disturbances she and a number of other students went onto the school playground. The principal appeared on the playground and told the students assembled there to go home. Crome then departed for home with other students. Linden McKinley High School was along her route and, as she stopped there on her way home, she was arrested by the Columbus police. No charges were ever filed and she was immediately released to her mother. (A. 131-33).

Later the same day, Crome's mother was informed by telephone that Crome was suspended from school. (A. 132-33). Shortly thereafter, Crome's mother received a form letter dated March 3, from the principal of McGuffey stating that "your son/daughter Betty J. Crome has been temporarily suspended from McGuffey Junior High." (A. 202). No reasons were given at that time, or at any other time, for the suspension, nor is there anything in the record in the present case which indicates why Crome was suspended. It does appear clear, however, that since she was not on the school grounds at the time she was informed of her suspension, there was obviously no emergency re-

quiring an immediate suspension to remove a disruptive influence.

Deborah Fox. In March, 1971, Deborah Fox was a tenth grade student at Marion-Franklin High School. She was suspended for twenty days and then subjected to a punitive transfer as a result of what were alleged to be her actions on March 10 and March 19, 1971. The underlying facts are in dispute. Fox testified that she did not do anything which violated any rule or regulation of the school; that she was suspended for two consecutive ten day periods by Mr. Kollmer, the Assistant Principal; that she was never given any reason for either suspension; and that Mr. Kollmer appeared emotionally upset during the day he first suspended her. (A. 148-51). Philip Fulton, the school Principal, gave contrary testimony at his deposition. Fulton stated that during the morning of March 10, Fox was disruptive, "loud and disrespectful" toward Mr. Kollmer, and that during the noon hour she was "still making negative comments" and told Kollmer that she "hated him." As a result of her "negative comments" during the noon hour, she was told to report to the administration office, and when she refused she was suspended. (A. 102-3). Kollmer wrote to Fox's parents stating that Fox had been suspended because she was "extremely defiant and disrespectful with the assistant Principal today." (A. 211).

Fulton testified that when the first suspension expired on March 19, 1971, and Fox returned to school with her parents for a conference, she repeated the same disrespectful attitude towards the Assistant Principal. (A. 104). Fox, on the other hand, testified that she and her parents were told about her second suspension immediately on their arrival for their meeting with the Assistant Principal on March 19, and that she made no disrespectful comments about the Assistant Principal. (A. 151). The letter of March 19 to Fox's parents from Kollmer, providing formal notice of the suspension, gives no reason for the suspension. (A. 212).

In any event, Fox was never allowed to return to Marion-Franklin and was given a punitive transfer to South High School on March 30, 1971. Despite the conflict in testimony, Fox was never given a hearing before or after her suspensions and transfer. In her permanent record appears the notation "3/15/71 suspended for student disruption." (A. 219).

Susan Cooper. In March, 1971, Susan Cooper was also a student at Marion-Franklin High School. On March 15, there was racial tension at Marion-Franklin. Cooper, pursuant to her mother's instructions, determined to leave the school grounds. She testified that she was unwilling to violate the school rules by leaving without an excuse, so she went to the attendance office to obtain official permission. There she talked to Kollmer who told her that she had to go to class. When she informed him that her mother had asked that she be allowed to go home if there were continuing tensions at the school, Kollmer told her "well, you are suspended anyway." (A. 138-39, 140-41). She then left the school, but she and her mother both returned to the school and waited to talk to Kollmer. He would not talk to them and ultimately they met briefly with Oscar Gill, another Assistant Principal. Gill told them that Cooper was suspended for ten days and that she could have a conference when she returned. (A. 141-42). The next day, Cooper's mother received a letter from Gill stating that she was suspended because she was "involved at the disturbance at school" and "showed a lack of respect for the principal." (A. 224). During the proceedings below, Fulton, the Principal of Marion-Franklin, stated in his deposition

that he had ordered Cooper to go to class, but that she refused and encouraged other students not to obey his order to go to class. (A. 110-11).

Prior to the commencement of this case, Cooper was never given a specific reason for her suspension. While she and her mother did speak briefly to the Assistant Principal upon her return to school, she was never given an opportunity to tell her side of the story. It is clear, however, that since Cooper was accused only of wanting to leave the school grounds to avoid the racial disturbances of March 15, there was no need to suspend her to remove any threat of disruption for which she was allegedly responsible.

While the precise factual details of the suspensions of the remaining plaintiffs, and of other students in Columbus, differ, there is no assertion that the defendants ever provided a hearing on the merits of the suspension to any suspended student. The lower court found as a fact that no such hearings were ever provided. (Jur. St. 64-65).

Many of those suspensions were made by administrative personnel under trying circumstances, where the administrators were beleaguered, if not, as the testimony indicated, actually emotionally upset. Mass suspensions under such conditions are hardly likely to reflect detached and unbiased judgments. The need for procedural protections under such circumstances is obvious. Yet, as noted, none of the students were ever—not before, not during, and not after the suspensions—given an opportunity to be heard. Indeed, many students were never given even the vaguest reason for their suspensions and in a number of other instances, the reasons given—such as "making negative comments"—hardly support suspensions at all.

Faced with what they not unreasonably regarded as unfair suspensions, the plaintiffs filed suit in the federal court seeking to have Section 3313.66 of the Ohio Revised Code declared unconstitutional insofar as it allows for suspensions with no procedural protections whatsoever. A three judge court was convened and a trial held. The undisputed testimony indicated that, in addition to the obvious hardships imposed upon students by a suspension—zeros for missed classwork, possible loss of credits, and the like (A. 164-65), the student is labeled a social deviant, with concomitant psychological harm, particularly where the student believes that his suspension was entirely unjustified. (A. 158-60, 172-76).

Based upon the record before it, the trial court concluded that Section 3313.66 of the Ohio Revised Code, and the procedures followed under that statute by the defendants, are violative of due process. (Jur. St. 65). The court held that informal procedures would be sufficient to satisfy the requirements of due process, but that such procedures must provide for written notice of the reasons for the suspension and an opportunity for the student to present a defense or an explanation of his or her conduct. The court held that such procedural protections must be accorded before the suspension is put into effect, unless the student's conduct is believed to be disruptive, in which case the hearing must be granted within three days after the suspension is effective. (Jur. St. 63-64). In view of the defendants' failure to follow minimally acceptable procedures in the present case, the court ordered all references to the suspensions involved in the present case deleted from the school records. (Jur. St. 65). From this holding, the defendants have appealed.

SUMMARY OF ARGUMENT

This Court has repeatedly concluded that education is of particular importance to children and to society as a whole, in part because of its singular relation to the continuance of our democratic institutions:

> "[Education] is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

See also *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923).

Students know that important lessons are learned from watching what is done by school personnel, not merely listening to what they say. Indeed, in pointing out the importance of public schools, this Court has stated that:

> "[T]hey are educating the young for citizenship. . . . [This] is reason for scrupulous protection of Constitutional freedoms of the individual [child] by the public schools, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 637 (1943).

Appellants and the Amici who support them would teach the children of this nation that our principles of government allow school authorities to suspend a student for substantial periods of time without giving the student a reason for the suspension or any opportunity to defend in even a rudimentary manner against the most egregious cases of mistake, bias, or overreaction by school authorities, even though serious personal consequences to the student may

follow. Indeed, Appellants would teach the nation's children that education is provided to serve the purposes of the State and the role of the student is merely incidental. (App. Br. 15).

Contrary to Appellants' position, however, constitutional rights do not stop at the schoolhouse door.

> "Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Healy* v. *James*, 408 U.S. 169, 180 (1972); *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960).

Students, like all other members of our society, have a right to fair treatment as required by the Due Process Clause of the Fourteenth Amendment. When a student is suspended from a public school, the Due Process Clause mandates that he or she be given at least the minimal procedural protections ordered by the lower court.

ARGUMENT

THE COURT BELOW CORRECTLY HELD THAT SUSPENSION FROM SCHOOL WITHOUT NOTICE OR HEARING IS PROHIBITED BY THE DUE PROCESS CLAUSE

The Fourteenth Amendment provides in relevant part that no State shall

> "deprive any person of life, liberty, or property without due process of law . . . ."

The court below quite properly held that the plaintiffs' attendance at public school was an interest protected by the Due Process Clause. The court relied primarily on its con-

clusion that school attendance was embraced within the concept of liberty, but noted also that school attendance might well be considered a property interest. Applying the traditional principles of due process analysis, the court held that, with such rights involved, due process requires notice and an informal hearing prior to a suspension except in emergency situations, when notice and an informal hearing must be provided afterwards. The Appellants' practice, which provided no notice or hearing at any time or in any case, plainly meets no such test and is therefore unconstitutional.

I.

Plaintiffs' Uninterrupted Attendance at Public School Is an Interest Protected by the Due Process Clause

A. *Plaintiffs Have a Liberty Interest Within the Meaning of the Due Process Clause*

This Court's opinion in *Meyer* v. *Nebraska, supra,* held that

> "Without doubt, . . . [liberty] denotes not mere freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." 262 U.S. at 399.

See also *Board of Regents* v. *Roth,* 408 U.S. 564, 572 (1972).

Thus, in *Meyer* the Court held that a restraint on the teaching of foreign languages interfered with a protected liberty. Similarly, in *Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925), the Court held that a state prohibition on a type of education (parochial schools) interfered with a

protected liberty. If a student's right to attend private school, or to learn a language, is a protected liberty, it would appear *a fortiori* that a student's right to attend public school at all must be a protected liberty.

Furthermore, this Court has held a number of times that where a charge imputing misconduct to a citizen is made, a protected liberty is involved:

> "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, [his liberty is involved]." *Wisconsin* v. *Constantineau,* 400 U.S. 433, 437 (1971).

See also *Board of Regents* v. *Roth, supra,* 408 U.S. at 573; *Wieman* v. *Updegraff,* 344 U.S. 183 (1952). We believe that without doubt the stigma which attaches from suspensions —discussed more fully at pages 19-20, below—has precisely the effect described by the Court in *Constantineau.* Thus, for this reason as well, a protected liberty is involved.

B. *Plaintiffs Have a Property Interest Within the Meaning of the Due Process Clause*

The Court's most recent analysis of the concept of property interests within the meaning of the due process clause is found in *Board of Regents* v. *Roth, supra.* There, the Court held that

> "To have a property interest in a benefit, a person clearly must have . . . a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. . . .
>
> Property rights, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as

> state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 408 U.S. at 577.

See also *Arnett* v. *Kennedy*, 42 U.S.L.W. 4513, 4530 (decided April 16, 1974) (Powell, J. concurring).

Similarly, in *Perry* v. *Sindermann*, 408 U.S. 593 (1972), the Court held that property rights

> "are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by existing 'rules or understandings.' . . . A person's interest in a benefit . . . is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit. . . ." 408 U.S. at 601.

We think it clear that plaintiffs' interest in attending school is "property" as defined in *Roth* and *Sindermann*. The Ohio constitution since the Northwest Ordinance of 1787 has provided for a public school system, and present Ohio statutes not only establish such a system, but require that all children between the ages of 6 and 18 attend school. Ohio Revised Statutes §§ 3313.48, 3313.64, and 3321.01 *et seq*. Furthermore, the Ohio courts have held that a child has the right to attend public school. *Dornette* v. *Allais*, 76 Ohio App. 345, 63 N.E.2d 805 (1945). The property right of plaintiffs here is at least as strong as that of the welfare recipients in *Goldberg* v. *Kelly*, 397 U.S. 254 (1969); of the uninsured driver in *Bell* v. *Burson*, 402 U.S. 535 (1971); and of the untenured instructor in *Perry* v. *Sindermann*, *supra*.

C. *The Interest Invaded Is Substantial*

This Court has made it clear that due process applies wherever the protected interest invaded "cannot be characterized as *de minimis*." *Fuentes* v. *Shevin*, 407 U.S. 67, 90 n. 21 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 342 (1969) (Harlan, J. concurring). The interests of the students involved here are plainly substantial.

1. *Interference with Education.* This court has correctly noted that "continuity of instruction [in public schools] is a significant and legitimate educational goal." *Cleveland Board of Education* v. *LaFleur*, —— U.S. ——, 94 S. Ct. 791, 797 (1974). Indeed, Appellants and their supporters make this point themselves with respect to the necessity of avoiding disruptions of school activities. (Ohio Amicus Br.[1] 13-14). But they fail to recognize that disruption of scholastic continuity is harmful not merely because it interferes with the school administrator's ease, but because it interferes with the student's opportunity to learn. In the present case, the facts are clear that the suspended students receive zeros for all work missed and have no opportunity to make up such work. (A. 164-65). And ten days is more than 10% of an entire school semester.

Appellants and their supporters claim that the effect of the suspensions on the plaintiffs' grades and education was minimal because, as a group, plaintiffs successfully completed their work during the semesters in which they were suspended. (Ohio Amicus Br. 11). This argument simply misses the point. First, a number of plaintiffs were not successful during the semesters involved. Plaintiff

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[1] We thus refer to the Amicus brief filed in support of Appellants by the Buckeye Association of School Administrators, *et al*.

Dwight Lopez, for example, lost credits since he was "suspended" in March, 1971, and was not allowed to return until the next semester. More important, even those plaintiffs who did maintain reasonable grades despite their suspensions were forced to do so under a handicap. But for their suspensions, they might well have done better. Compare *Burke* v. *Ford*, 389 U.S. 320 (1967). In fact, Appellant Norval Goss himself admitted that a suspension could well have an adverse academic effect. (A. 166).

Moreover, it is the qualitative nature of the deprivation which is important, not merely the length of time involved:

> "The Fourteenth Amendment draws no bright lines around 3-day, 10-day or 50-day deprivations of property. Any significant taking of property by the State is within the purview of the Due Process Clause. While the length and consequent severity of the deprivation may be another factor to weigh in determining the appropriate form of hearing, it is not decisive of the basic right . . . ." *Fuentes* v. *Shevin, supra*, 407 U.S. at 86.

See also *Sniadach* v. *Family Finance Corp., supra; Bell* v. *Burson, supra.*

2. *Maintenance of Permanent Records.* Even a short suspension has a permanent effect on the student because of the elaborate record keeping by the school system and the utilization of such records in future evaluation of the student. Thus, for example, Plaintiff Deborah Fox had entered in her records the notation "3/15/71 suspended for student disruption." (A. 219). Colleges rely on such information in determining whom to admit; teachers and school administrators rely on such information for recommendations, and in consideration of placement of students; and courts may even rely on such records for passing judgment on children appearing in family court and in other juvenile proceedings. See *Hatter* v. *Los Angeles City High School District*, 452 F.2d 673 (9th Cir. 1971); *Vail* v. *Board of Education*, 354 F. Supp. 592 (D.N.H. 1973); W. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. Pa. L. Rev. 545, 579 n. 161 (1971). Furthermore, insofar as grades are affected by a suspension, that effect is also permanently bound into the student's records. *Shanley* v. *Northeast Independent School District*, 462 F.2d 960, 967 n. 4 (5th Cir. 1972) (noting that a one hour suspension as a result of which a student missed a final examination and flunked a course would be "quite critical"). Thus, the suspension may be relatively short-term, but its effects are not. The court below properly recognized this factor when it ordered the defendants to expunge from their records information about Plaintiffs' suspension.

3. *Stigma.* The stigma attaching from a suspension was the subject of uncontroverted testimony in the court below. Teachers and school administrators believe that the suspended student is a social deviant, expect the student to be a troublemaker in the future, and react to him or her accordingly. (A. 157, 173). Often, his or her family and friends are of the same view. (A. 158, 174). The psychologists who testified below, both experts in the field, concluded that every suspension stigmatizes a child. (A. 158-59, 173). And they both agreed that the effect was all the worse where the student had little perception of the reasons for the suspension, as was the case here. (A. 160, 176).

The lower courts have reached the same conclusion as to stigma. See, *e.g., Dixon* v. *Alabama State Board of Education*, 294 F.2d 150, 157 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961). Thus, as one lower court put it:

> "[S]uspension is a particularly humiliating punishment, evoking images of the public penitant of medieval Christendom and colonial Massachusetts, the outlaw of the American West, and the ostracized citizen of classical Athens. Suspension is an officially-sanctioned judgment that a student be for some period removed beyond the pale." *Sullivan* v. *Houston Independent School District*, 333 F. Supp. 1149, 1172 (S.D. Tex. 1971).

For this reason, too, the Plaintiffs' interest is substantial.

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Appellants and the Amici who support them contend that education is entirely beyond the scope of the due process clause and no deprivation of education need be accompanied by any procedural safeguards. Every court to consider that proposition has flatly rejected it. See, *e.g.*, *Papish* v. *Board of Curators of the University of Missouri*, 410 U.S. 667 (1973); *Hatter* v. *Los Angeles City High School District, supra; Dixon* v. *Alabama State Board of Education, supra.*

The Appellants seek to avoid this overwhelming weight of authority by arguing that because this Court held in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973), that education is not a "fundamental interest" for purposes of the equal protection clause, deprivation of education is entitled to no due process protection at all. That argument is not merely incorrect, it is downright bizarre. A determination of fundamentality for equal protection purposes depends upon whether the interest is "explicitly or implicitly guaranteed by the Constitution" and is relevant only to whether a classification involving that interest must survive a compelling state interest or merely a rational basis test. *Rodriguez, supra,*

411 U.S. at 33-34.[2] Whether an interest is fundamental or not is plainly irrelevant to due process considerations, for, as noted above, the Due Process Clause applies to statutorily created, as well as constitutionally created, rights. *Board of Regents* v. *Roth, supra,* 408 U.S. at 577. In fact, this Court so indicated in *Rodriguez* itself. See 411 U.S. at 33 n. 72. For as the Court there pointed out, in *Dandridge* v. *Williams*, 397 U.S. 471 (1970), and *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), the Court held that welfare is not a fundamental right for equal protection purposes, but that it is a protected property interest for due process purposes. See also *Bell* v. *Burson, supra,* requiring due process hearings for the deprivation of a drivers license, hardly a "fundamental interest"; and *Kister* v. *Ohio Board of Regents*, 365 F. Supp. 27, 39 (S.D. Ohio 1973), *aff'd mem.*, —— U.S. ——, 94 S. Ct. 855 (1974), where the court held that "while education is not a fundamental right, that does not mean the university may arbitrarily dismiss a student without due process of law."

We think it clear that due process protections attach to educational deprivations of the sort involved here.

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[2] In *Rodriguez*, this Court seriously considered the constitutionality of the Texas statute under the rational basis test. The Court ultimately determined that the Texas scheme "was not so irrational as to be invidiously discriminatory." Nevertheless, its approach to the challenge clearly demonstrates that the absence of a fundamental interest, even in an equal protection case, is hardly tantamount to an absence of constitutional protection.

II.

The Procedures Ordered by the Lower Court Are Required to Meet Minimum Due Process Standards

Once it is determined that a non *de minimis* protected interest is involved, it is evident that the Ohio statute here in question and the Appellants' *modus operandi*, which provide no process at all, are unconstitutional. It remains to be considered only what process is due. *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972); *Arnett* v. *Kennedy*, *supra*, 42 U.S.L.W. at 4531 (Powell, J., concurring), 4524 (Marshall, J., dissenting).

We start, as did the court below, with this Court's opinion, in *Board of Regents* v. *Roth*, *supra*:

> "Before a person is deprived of a protected interest, he must be afforded opportunity for some kind of a hearing, 'except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.' *Boddie* v. *Connecticut*, 401 U.S. 371, 379. 'While [m]any controversies have raged about . . . the Due Process Clause, . . . it is fundamental that except in emergency situations . . . due process requires that when a State seeks . . . [to deprive a person of a protected interest] . . . it must afford 'notice and opportunity for hearing appropriate to the nature of the case' *before* the . . . [deprivation] becomes effective.' *Bell* v. *Burson*, 402 U.S. 535, 542." 408 U.S. at 570 n. 7.

See also *Arnett* v. *Kennedy*, *supra*, at 4531 (Powell, J., concurring), 4524 (Marshall, J., dissenting); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969); *Armstrong* v. *Manzo*, 380 U.S. 545 (1965).

The students' interests have been set out in some detail above. They are, in brief, to continue their educations uninterrupted, without unnecessarily and unfairly missing school work, with the consequent adverse educational effects in grades and credits; to avoid being stigmatized unfairly and incorrectly as troublemakers, with the resulting psychological and educational damage; and to maintain their permanent educational files and records free of entries which improperly indicate for future reference that the student engaged in misconduct and was suspended, with possibly permanent damage to the student's ability to obtain admission to college, a good job, and the like.

The interest of the City of Columbus in suspending students from school without procedural protections is, quite frankly, unclear to us. We would have thought, for the reasons set forth in the Summary of Argument, *supra*, that in our society school administrators have every interest in demonstrating to their students that democratic procedures work, and work well in protecting the rights of citizens.[3] The present Amici, who themselves are intimately involved in school matters, are certainly of that view. See,

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[3] See W. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. Pa. L. Rev. 545, 574-75 (1971):

> "[T]he school has an interest in providing fair procedures. Although procedural due process is only one educational value of many, its importance is especially great at a time when serious questions are being raised about the validity of what the school offers. From a more pragmatic point of view, providing fair procedures for school discipline may actually eliminate the distracting effect of disciplinary proceedings that do not give the student a fair opportunity to defend himself against the authorities or that leave students with a feeling that they have been dealt with unfairly. . . . The school has no legitimate interest in disciplining a student who has not been given a minimal opportunity to establish his innocence or the inappropriateness of a particular sanction."

e.g., National Education Association, Code of Student Rights and Responsibilities (1971).

That does not mean that Appellants have no interest in avoiding unnecessarily formal procedures. The court below held, and Amici agree, that school officials have an interest in controlling discipline and in avoiding disruption by both unruly students and procedures which require too much formality. The lower court's decision fully accommodated the Appellants' interests in its holding that (a) a hearing must normally be provided before suspension, but where the student involved is threatening to disrupt the academic atmosphere of the school, or endangering property or personnel, the hearing might be held anytime within three days of the suspension; (b) the hearing need not allow counsel or follow formal rules, but need merely provide the student with statement(s) of what he or she has allegedly done and give the student an opportunity to submit his or her own statement and statements of others in his or her defense; and (c) the administrator making the suspension decision tell the student reasonably promptly what decision has been made and why.

These requirements are truly minimal. Prior decisions of this court have uniformly held that where factual issues must be resolved, due process requires an evidentiary hearing with and unbiased trier of fact and the right to present evidence and confront and cross-examine accusers. Such protections can be provided in even the most informal proceedings. *Morrissey* v. *Brewer, supra; Goldberg* v. *Kelly, supra.* The opinion of the court below, of course, does not go even this far.[4]

Yet the Appellants and the Amici who support them would reject even the minimal protections ordered by the

[4] Since Appellees herein have not cross-appealed, there is no need for this Court to consider the adequacy of the remedy provided by the lower court.

court below. In support of this result, they advance a number of wholly unpersuasive arguments:

1. First they maintain that they "are committed to the improvement of education in the public schools," and that such improvement can result only from "a process of experimentation and innovation involving the utilization" of suspensions as "educational tools." (Ohio Amicus Br. 1). Suspension as an "educational tool" hardly seems a good faith "improvement in the educational process," but in any case, what is involved here is not a school administration's right to suspend students in appropriate cases, but only its right to do so without a hearing.

2. Next they claim that "flexibility" and "efficiency" require that schools must use summary procedures in all cases. They claim that any type of a hearing will always have disruptive effects on the conduct of school programs and submit copious statistics as to the large number of suspensions yearly in Ohio schools. (Ohio Amicus Br. 12-13, 23-24). This argument simply misstates the case. Many, if not a majority, of large and small school districts around the country have been operating for years on a prior hearing basis without significant problems. Such districts include Houston, Texas, Pittsburgh, Pennsylvania, and Seattle, Washington. *Sullivan* v. *Houston Independent School District,* 333 F. Supp. 1149 (S.D. Tex. 1971); Pittsburgh Board of Public Education, Procedures for Dealing with Student Misconduct (1971); Seattle School Board, Statement of Rights and Responsibilities (1970).[5] See gen-

[5] The Seattle regulations guarantee a full due process hearing and go much further than the minimum requirements ordered by the court below:

"Procedural Rules and Regulations for the School Community.

The constitutional rights of individuals assure the protection of due process in law; therefore, this system of constitutionally

erally P. Lines, *The Case Against Short Suspensions,* Inequality in Education, No. 12, p. 39 (July, 1972). Furthermore, the procedures required by the Court below were

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and legally sound procedures is developed with regard to the administration of discipline in the Seattle Public Schools:

(1) The hallmark of the exercise of disciplinary authority shall be fairness.

(2) Every effort shall be made by administrators and faculty members to resolve problems through effective utilization of school district resources in cooperation with the student and his parent or guardian.

(3) A student must be given an opportunity for a hearing if he or his parent or guardian indicate the desire for one. A hearing shall be held to allow the student and his parent or guardian to contest the facts which may lead to disciplinary action, or to contest the appropriateness of the sanction imposed by a disciplinary authority, or if the student and his parent or guardian allege prejudice or unfairness on the part of the school district official responsible for the discipline.

(4) The hearing authority may request the student and parent or guardian to attempt conciliation first, but if the student and parent or guardian decline this request, the hearing authority shall schedule the hearing as soon as possible.

(5) The following procedural guidelines will govern the hearing:

a. Written notice of charges against a student shall be supplied to the student and his parent or guardian.

b. Parent or guardian shall be present at the hearing.

c. The student, parent or guardian may be represented by legal counsel.

d. The student shall be given an opportunity to give his version of the facts and their implications. He should be allowed to offer the testimony of other witnesses and other evidence.

e. The student shall be allowed to observe all evidence offered against him. In addition he shall be allowed to question any witness.

f. The hearing shall be conducted by an impartial hearing authority who shall make his determination solely upon the evidence presented at the hearing.

g. A record shall be kept of the hearing.

designed to minimize disruption by allowing statements in written form and by limiting the formality required.

That school systems in Houston and Seattle, for example, which are much larger than that of Columbus, can successfully operate under a prior hearing system clearly demonstrates the irrelevance of the statistics submitted by Appellants' supporters. Indeed, the large numbers submitted may well demonstrate nothing more than that under the Ohio statute here at issue school administrators use the "educational tool" of suspension much too freely.[6] Indeed, numerous studies have shown that, where adequate procedures are not followed, suspensions are too often abusively used.[7] C. Wright, *The Constitution on Campus,* 22 VAND. L. REV. 1027, 1059-60 (1969).

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h. The hearing authority shall state within a reasonable time after the hearing his findings as to whether or not the student charged is guilty of the conduct charged and his decision, if any, as to disciplinary action.

i. The findings of the hearing authority shall be reduced to writing and sent to the student and his parent or guardian.

j. The student and his parent or guardian shall be made aware of their right to appeal the decision of the hearing authority to the appropriate appellate authority."

Seattle School Board, Statement of Rights and Responsibilities (1970), reprinted in Administrator's Notebook, Vol. XX, No. 6, pp. 3-4 (February, 1972).

[6] Dayton, Ohio, for example, nearly halved the number of suspensions (and, incidentally, reduced the number of expulsions sixfold) by revising its procedures under a federal program. Education USA, Vol. 16, No. 25, p. 134 (February 18, 1974).

[7] For example, about twice as many black students seem to be summarily suspended from school as whites. Southern Regional Council, The Student Pushout: Victims of Continued Resistance to Desegregation 4-6 (1973); Report of the Senate Select Comm. on Equal Educational Opportunity, "Toward Equal Educational Opportunity," 92d Cong., 2d Sess. 140 (1972). Similarly, suspen-

Moreover, "flexibility" and "efficiency," while not irrelevant, are not the end point of any constitutional analysis. As this Court held in *Stanley* v. *Illinois*, 405 U.S. 645 (1972):

> "The establishment of prompt and efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from . . . overbearing concern for efficacy . . . ." 405 U.S. at 656.

3. Finally, and at greatest length, Appellants, *et al.*, argue that student disruptions always create an emergency so that a prior hearing is not required. (Ohio Amicus Br. 14-15). Initially, it should be noted that where there is a disruption or threat to order, the lower court decision allows the hearing to be held after the suspension takes effect. But it is just not true that students are only suspended in emergency situations. The facts in this case plainly demonstrate otherwise. For instance, Plaintiff Dwight Lopez was suspended when he was at home after school had been let out for the weekend. Plaintiff Betty Crome was also

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sions of students for exercise of their First Amendment rights have been a continuing problem. The facts in this case show that one of the plaintiffs, Susan Cooper, was suspended for making "negative comments," a right one might have thought enjoyed First Amendment protection and which might not so easily have been ignored with proper procedural protections. See *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503 (1969); *Papish* v. *Board of Curators of the University of Missouri*, *supra*; *Shanley* v. *Northeast Independent School District*, *supra*.

suspended while at home. Plaintiff Susan Cooper was suspended because she wanted to leave the school grounds. It is hard to see what "emergency" necessitated immediate action in these cases. There are, no doubt, many other similar non-emergency cases among the suspensions which have taken place under the Ohio statute here in question.

In our view, the procedures ordered by the lower court are the very minimum consistent with the requirements of due process.

CONCLUSION

Appellants and their supporters strenuously maintain that the Ohio statute should be held to be constitutional because due process does not require a prior hearing. That contention is simply not consistent with this Court's rulings on due process. Moreover, the Appellants conveniently ignore the fact that the statute and their own standard operating procedure involved here does not provide for any form of hearing *ever—neither before nor after* the suspension. No case has ever upheld the deprivation of a pro-

tected right without some form of hearing at some time. Yet that is precisely what Appellants would have this Court do. The lower court properly rejected Appellants' contentions, and its decision should be affirmed.

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